89-135

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

IRA WILLIAM HOLROYD,
PETITIONER,
VS.
CALIFORNIA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE DEPARTMENT
OF THE SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER PRO SE

33 pgs.

QUESTION PRESENTED

Whether a criminal defendant may be compelled, following his arrest and invocation of his right to remain silent, to perform physical tests, such as field sobriety tests, the results of which are intended for evidentiary use to convict him of the charges for which he was arrested; and, whether such results may be introduced into evidence against him upon his claim of privilege under the Fifth Amendment right against self-incrimination.

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Respondent.

PETITION FOR WRIT OF CERTIORARI

IRA WILLIAM HOLROYD, Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the Appellate Department of the Superior Court of California, County of Los Angeles, filed on June 13, 1989.

OPINION BELOW

The judgment and opinion rendered by the Appellate Department of the Superior Court of California, County of Los Angeles on June 13, 1989 (Appendix A herein).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(a) relating to a privilege claimed under the Fifth Amendment of the Constitution of the United States. The judgment was rendered by the highest court

in the State in this proceeding.

CONSTITUTIONAL PROVISION INVOLVED

"No person . . . shall be compelled in any criminal case to be a witness against himself. . ."

United States Constitution, Amendment V.

STATEMENT OF THE CASE

Petitioner was convicted in Los Angeles Municipal Court of the criminal offense of driving an automobile while under the influence of intoxicating liquor. Following his arrest he invoked the right to remain silent. He was thereafter handcuffed and taken to jail. At the jail he was ordered to perform a field sobriety test consisting of a heel-to-toe walking and turning maneuver. The arresting officer determined that petitioner failed the test by repeatedly stepping or falling off the line, not touching his heel to toe, and not per-

forming the test as demonstrated.

At trial, prior to empanelling of the jury, petitioner moved to exclude evidence of the field sobriety test as constituting inadmissible evidence of communications compelled of him after his arrest and his invocation of his right to remain silent. The motion was denied on the basis that the right to remain silent is a testimonial privilege and not applicable to a non-testimonial field sobriety test. The arresting officer was allowed to testify as to his findings and opinions from the compulsory test. (Engrossed Settled Statement) (Appendix B herein).

Petitioner sought reversal of the conviction on the sole ground that his rights under the Fifth Amendment to the Constitution of the United States against

self-incrimination had been violated. (Appellant's Opening Brief) (Appendix C herein).

REASON FOR GRANTING WRIT

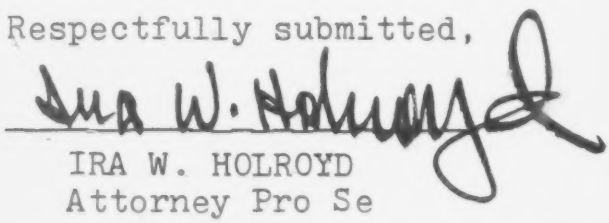
The writ should be granted because the case presents an important question of federal law which, although broadly hinted at in Schmerber v. California (1966) 384 U.S. 757, 761,764, has not been settled by this Court. That is: Can a criminal defendant be compelled to provide evidence against himself of a testimonial or communicative nature such as by the performance of physical tests.

CONCLUSION

This petition presents an important issue which far outreaches whatever consequences may befall your petitioner. Confining the privilege of a criminal defendant not to be a witness against

himself to merely word-of-mouth utterances or the written equivalent thereof, must be considered a pernicious invasion of perhaps the single most important fundamental right of individuals against tyranny.

Respectfully submitted,



IRA W. HOLROYD
Attorney Pro Se

APPENDIX A

FILED
JUN 13, 1989
FRANK S. ZOLIN, County Clerk
/s/ Alan Hardey
BY ALAN HARDEY, DEPUTY

APPELLATE DEPARTMENT OF THE SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. IRA WILLIAM HOLROYD, Defendant and Appellant.	Superior Ct. No. CR A27087 Municipal Court of the Los Angeles Judicial Dist. No. 87D03539 MEMORANDUM JUDGMENT

This cause having been submitted for decision, and fully considered, judgment is ordered as follows:

The order denying Appellant's motion to suppress and the judgment of conviction are affirmed. On remand, the trial court is directed to modify Appellant's sentence in accordance with this opinion.

Appellant contends that admission of results of the heel-to-toe sobriety test

administered after he was arrested and had invoked his right to remain silent violated his Fifth Amendment privilege against self-incrimination.

Contrary to Appellant's argument, the decision in Whalen v. Municipal Court (1969) 274 Cal. App. 2d 809 controls here. In Whalen, supra, the defendant raised the same argument as Appellant; i.e. that the heel-to-toe field sobriety test fell within the protection of the privilege against self-incrimination because it constituted "testimonial" evidence. The court in Whalen disagreed, explaining, ". . . (C)ourts have repeatedly distinguished between 'testimonial' and 'physical' evidence." (Id. at p. 811.) This distinction was set forth in Schmerber v. California (1966) 384 U.S. 757, in which the Supreme Court held:

> "The distinction which has emerged, often expressed in different ways, is that the privilege (against self-incrimination) is a bar against compelling 'communications' or 'testimony', but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it. . . . Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds." (Id. at pp. 764-765.)

The court in Whalen, supra, 274 Cal. App. 2d 809, held:

> "We adopt the rationale of Schmerber v. California, supra, for it is apparent that if evidence obtained over a defendant's objection from a blood test is not covered by the Fifth Amendment, assuredly evidence obtained by an officer in observing a defendant perform the simple physical exercises required in a field sobriety test does not fall within the protection of the privilege." (Id. at p. 812.)

Contrary to Appellant's assertion, the discussion of the Fifth Amendment privilege issue in Whalen, supra, was not

dicta; it was essential to the court's holding. While Appellant also argues that Whalen was poorly reasoned and that it misinterpreted the holding in Schmerber, supra, ". . . (the) rule requiring a court exercising inferior jurisdiction to follow the decisions of a court exercising a higher jurisdiction has particular application to the appellate departments of the superior court." (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 456.)

Thus, we conclude that evidence of the result of Appellant's heel-to-toe sobriety test was admissible.[1]

/s/ Margolis
Presiding Judge

We concur.

/s/ Roberson
Judge

/s/ Swearinger
Judge

---

[1] Pursuant to Respondent's request, we direct the trial court on remand to clarify the sentence herein with respect to count II (violation of Veh. Code, Sec. 23152, subd. (b)). The court is directed to specify the terms and conditions to be imposed as part of the sentence for count II, and to order imposition of sentence on count II stayed pending successful service of the sentence on count I, at which time the stay of sentence on count II shall become permanent.

APPENDIX B

MUNICIPAL COURT OF THE LOS ANGELES
JUDICIAL DISTRICT COUNTY OF LOS ANGELES,
STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. IRA WILLIAM HOLROYD, Defendant.	No. 87 D03539 ENGROSSED SETTLED STATEMENT

STATEMENT OF PROCEEDINGS

On April 16, 1987, a criminal complaint was filed in the above court charging the defendant, Ira William Holroyd, with violations of sections 23152(a) and 23152(b) of the California Vehicle Code. Trial by jury commenced in Division 117, June 15, 1987, the Honorable Isabel R. Cohen, Judge, presiding; defendant, an attorney, represented himself after being duly advised and waiving his right to counsel.

Prior to empanelling the jury defendant moved to exclude certain evidence.

The court granted his motion to exclude testimony by the arresting officer, L.A.P.D. Sergeant Dewey, of hearsay statements of an unidentified motorist allegedly concerning defendant's driving. Defendant then moved to exclude evidence of the field sobriety test administered in the West Valley Police Station after he had been placed under arrest and invoked his right to remain silent. The motion was denied on the basis that the right to remain silent is a testimonial privilege and not applicable to a non-testimonial field sobriety test - in this case, the walk-the-line test. (See court's minutes dated June 15, 1987.) The officer who administered the walk-the-line test testified defendant repeatedly stepped or fell off the line, did not touch heel to toe, did not perform the test as demonstrated and failed to pass it.

. . .

Sergeant Dewey testified that when defendant asked if he was under arrest he was told that he was; that he thereafter refused to answer any further question after telling the officer that it would not, under the circumstances, be prudent to do so; that thereafter the officer parked defendant's car and gave defendant the keys to it; that he was handcuffed, placed in the back of the squad car and taken to jail; that at the jail the defendant was ordered to take an additional field sobriety test consisting of a heel-to-toe walking and turning maneuver; that he failed this test by repeatedly falling or stepping off the line and by not performing as he had been instructed and as it had been demonstrated.

. . .

Sergeant Dewey testified that in his

opinion, defendant was under the influence of an alcoholic beverage at the time of the driving and impaired such that he could not safely operate a motor vehicle.

. . .

DEFENDANT'S AND APPELLANT'S POINTS ON APPEAL

The grounds on which defendant relies on appeal are:

1. The admissibility into evidence of communications compelled of defendant after his arrest and his invocation of his right to remain silent under the Fifth and Fourteenth Amendments to the United States Constitution, Article 1, Section 15 of the Constitution of California and Evidence Code Section 940;

. . .

The Court does now settle and allow the foregoing Engrossed Settled Statement on appeal and certifies that the

same is a true and correct statement of the proceedings had in the above entitled action.

DATED: October 17, 1988.

/s/ ISABEL R. COHEN
ISABEL R. COHEN
Judge of the Municipal Court
Los Angeles Judicial District

APPENDIX C

APPELLATE DEPARTMENT OF THE SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, - vs - IRA WILLIAM HOLROYD, Defendant and Appellant.	Superior Ct. No. CR A 27087 Trial Court No. 87D03539

APPELLANT'S OPENING BRIEF

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Attorney for Defendant and Appellant

STATEMENT OF THE CASE

Insofar as relevant to the issue raised on appeal herein the pertinent facts are as follows:

1. Appellant was arrested on suspicion of driving under the influence. (ESS 3)

2. Appellant invoked his right to re-

main silent upon being advised of his arrest. (ESS 3,4,7)

3. Subsequent to invoking his right to remain silent appellant was taken to jail. There he was ordered to take a field sobriety test consisting of a heel-to-toe walking and turning maneuver. (ESS 4)

4. The arresting officer concluded that appellant failed the custodial test and the officer testified to this at trial. (ESS 4)

5. The appellant objected to admissibility into evidence of this communication compelled of defendant after his arrest and his invocation of his right to remain silent under the Fifth and Fourteenth Amendments to the United States Constitution. (ESS 1,11)

6. The objected to testimony consis-

ted of the officer testifying that appellant repeatedly was falling or stepping off the line and not performing as he had been instructed and as had been demonstrated. (ESS 4)

ARGUMENT

The highest court in the land, by the narrowest of margins, approved of the evidentiary use of a blood sample taken over objection from a person under arrest for driving under the influence of intoxicating liquors. Schmerber v. California (1966) 384 U.S. 757. It was held that this did not violate the privilege against self-incrimination. The rationale for this decision was that the taking of blood did not involve any testimonial capacities or communicative act. It was akin to photographing or fingerprinting

the accused.

Unfortunately, three years later, another California case, Whalen v. Municipal Court (1969) 274 Cal. App. 2d 809 at 812, presumed to adopt the rationale of Schmerber by stating "that if evidence obtained over a defendant's objection from a blood test is not covered by the Fifth Amendment, assuredly evidence obtained by an officer in observing a defendant perform the simple physical exercises required in a field sobriety test does not fall within the protection of the privilege." (emphasis added)

The appellate court's conclusion in Whalen is a perfect example of a non sequitur and fails completely to understand the holding of the United States Supreme Court. The language of Schmerber quoted in headnote number one of Whalen

does not support the appellate court's ipse dixit. The language left out from between the quoted portions of Schmerber issues a stern warning against the use of a "real or physical evidence" distinction to obviate the constitutional mandate prohibiting "communications" or "testimony" where the self-incrimination privilege has been claimed.

At page 764 of Schmerber the court states:

> "Although we agree that this distinction is a helpful framework for analysis, we are not to be understood to agree with past applications in all instances. There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain 'physical evidence' for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is

> to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege 'is as broad as the mischief against which it seeks to guard,' Counselman v. Hitchcock. 142 U.S. 547, 562" (emphasis added)

Clearly, the officer ordering appellant to perform a heel-to-toe walking test in the jail, after appellant's arrest and his invocation of his Fifth Amendment privilege against self-incrimination, had no purpose in mind other than to secure evidence to determine appellant's guilt on the basis of his responses to the officer's commands. This was a "communication" to the officer no less than a verbal response to a question. The non-verbal "communication" was improperly offered and received into evidence against appellant for the purpose of securing a conviction. And, as stated by the court in Schmerber at

pages 763-764:

> "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take . . . " (emphasis added)

It is significant to point out that the holding in Whalen, supra, is dicta. There was no necessity for the court to rule as it did since the evidence was conflicting as to whether the accused had invoked his constitutional rights prior to administration of the field sobriety tests. In other words, if the trier-of-fact believed the officer, who testified that the defendant had made no such request as to be permitted to call an attorney until after the administering of the field sobriety tests, the results of the tests would have been a proper subject for the trier-of-fact's consideration.

Unlike an accused's blood, breath or

urine sample, which may be equated to a photograph, fingerprint or measurement (all of which have been properly taken) that requires no testimonial compulsion or enforced communication, the performance of tests prescribed by a police officer must be considered a "communication". One cannot draw a universal conclusion from the human performance of a test as readily as one might from a chemical analysis properly performed.

In Pennsylvania v. Bruder (1988) No. 88-161, 49 CCH S. Ct. Bull. B 165 at B 167, the United States Supreme Court held that because field sobriety tests were administered before an accused was taken into custody they were properly received into evidence against him. Bruder was only placed under arrest after failing the field sobriety tests. Accordingly, the Supreme Court found

that it was not necessary to reach the issue of whether recitation of the alphabet in response to custodial questioning is testimonial and hence inadmissible under Miranda v. Arizona, (1966) 384 U.S. 436.

CONCLUSION

It is respectfully submitted that the conviction herein appealed from be reversed on the ground that appellant's Fifth Amendment rights were violated.

Dated: January 26, 1989

Respectfully submitted,

/s/ IRA W. HOLROYD

IRA W. HOLROYD
Attorney for the Defendant
and Appellant